

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

OUR MONEY OUR TRANSIT, *et al.*,

Plaintiffs,

v.

FEDERAL TRANSIT  
ADMINISTRATION, *et al.*,

Defendants

and

LANE TRANSIT DISTRICT,

Intervenor-  
Defendant.

No. 2:13-cv-01004-TSZ

**PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT AND  
INCORPORATED MEMORANDUM  
OF LAW**

**NOTED ON MOTION CALENDAR:  
April 25, 2014**

***Oral Argument Requested***

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1 Pursuant to Fed. R. Civ. P. 56, and for the reasons set forth in the incorporated  
2 memorandum of law, Plaintiffs Our Money Our Transit and Robert Macherione  
3 respectfully file this motion for summary judgment.

#### 4 INTRODUCTION

5 The shortest distance between two points is a straight line—unless, apparently, the  
6 one performing the measurement is a public transit agency. In this case, Defendants were  
7 faced with a choice between two basic routes for a Bus Rapid Transit project. They  
8 evaluated those routes using a number of criteria and concluded that one was significantly  
9 faster, cheaper and less likely to adversely affect the environment. Then they chose the  
10 other route. More importantly for purposes of this case, Defendants completely excluded  
11 the demonstrably superior route from their National Environmental Policy Act (“NEPA”)  
12 evaluation. That omission strikes at the heart of NEPA’s procedural requirements and  
13 cannot be allowed to stand.

14 Although Defendants’ decision to limit their environmental review to their lone  
15 preferred alternative is by itself enough to warrant judgment in Plaintiffs’ favor, it is far  
16 from the only NEPA violation Defendants committed in this case. Rather than considering  
17 a range of options that could have helped resolve alleged traffic problems, Defendants  
18 improperly crafted a project purpose that made the selection of their preferred Bus Rapid  
19 Transit alternative inevitable. Rather than preparing a detailed Environmental Impact  
20 Statement assessing the effects of their project, Defendants have impermissibly relied on  
21 vague mitigation measures to support their conclusion that the project will not have a  
22 significant impact on the environment. And rather than taking a hard look at serious  
23 environmental problems related to traffic, land use and environmental justice, Defendants  
24 have tried to get by with an incomplete environmental analysis. Any one of these errors  
25 renders Defendants’ decision to move forward with their proposed Bus Rapid Transit  
26 extension arbitrary and capricious.

## BACKGROUND

### A. Statutory and Regulatory Background

Intervenor-Defendant Lane Transit District (“LTD”)’s proposed 8.8-mile round trip extension to its Bus Rapid Transit system is projected to cost \$95.6 million—nearly \$11 million per mile. AR0115158 – AR0115159. To pay this exorbitant price tag, LTD plans to seek \$74.5 million in federal funding under Defendant Federal Transit Administration (“FTA”)’s Small Starts program. AR0115159. Small Starts authorizes grants of up to \$75 million for certain new fixed guideway or corridor-based bus projects. FTA, Updated Interim Guidance on Small Starts, *available at* [http://www.fta.dot.gov/12304\\_9055.html](http://www.fta.dot.gov/12304_9055.html). Because the provision of almost \$75 million to LTD for the construction of its proposed West Eugene Emx Extension (“WEEE”) would qualify as a “major federal action,” FTA was obligated to consider the environmental effects of that action under NEPA. 42 U.S.C. § 4321, *et seq.*

NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). The application of NEPA and its implementing regulations is intended to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” *Id.* § 1500.1(b). By requiring an environmental study in advance of any “major federal action,” NEPA forces federal decision-makers to “carefully weigh environmental considerations and consider potential alternatives to the proposed action” prior to undertaking a project.<sup>1</sup> *‘Ilio ‘ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1093 (9th Cir. 2006) (citation omitted). When a federal agency fails to comply with NEPA by, for example, omitting a reasonable alternative from its study, or failing to take a hard look at environmental effects, courts will require the agency

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<sup>1</sup> Although NEPA requires preparation of an Environmental Impact Statement any time a proposed project will “significantly affect” the environment (42 U.S.C. § 4332(2)(C)), agencies may in some cases take the preliminary step of preparing a less-detailed Environmental Assessment to decide whether the environmental effects of a proposed action cross the threshold of significance. 40 C.F.R. § 1508.9.

1 to fulfill its NEPA obligations before the project moves forward. *See Western Watersheds*  
 2 *Project v. Abbey*, 719 F.3d 1035, 1054 (9th Cir. 2013).

3 **B. LTD's Initial Project Development and Review of Alternatives**

4 The WEEE would be an extension of LTD's existing Bus Rapid Transit system,  
 5 known as the Emerald Express ("EmX"), which serves the communities of Eugene and  
 6 Springfield, Oregon. AR0118825. The EmX employs special buses that are not  
 7 interoperable with other buses in the LTD fleet. AR0118822-AR0118823. Although EmX  
 8 buses can drive on any road, they can serve customers only at special high-platform  
 9 stations. *Id.* Consequently, EmX buses can provide service only within the EmX  
 10 infrastructure. *Id.*

11 The Eugene City Council and LTD Board of Directors began considering the WEEE  
 12 in 2007. AR0118825. Their idea was to use FTA Small Starts funding to bring Bus Rapid  
 13 Transit to West Eugene by extending the EmX along the West 11th Avenue Corridor—the  
 14 primary east/west transit corridor linking the west side of Eugene to the downtown area.  
 15 *Id.*; AR0118805. Apparently recognizing that the WEEE was a major federal action that  
 16 could have significant environmental effects, FTA published a notice of intent to prepare an  
 17 Environmental Impact Statement ("EIS") in the September 18, 2007 issue of the Federal  
 18 Register. 72 Fed. Reg. 53281 (Sept. 18, 2007). Soon thereafter, FTA and LTD refined the  
 19 purpose and need for the project and began developing and screening alternatives.  
 20 AR0082125.

21 On March 19, 2008, the LTD Board of Directors formally adopted a statement of  
 22 purpose and need for the WEEE, which provides in relevant part that "[t]he Purpose of the  
 23 [WEEE] is to implement high-capacity public transportation service . . . utilizing the  
 24 adopted high-capacity transit mode identified in the Regional Transportation Plan, that is  
 25 less hindered by congestion and that provides efficient, effective, dependable, and visually  
 26 appealing service throughout the life of the project." AR0052649. For the next year, LTD

1 developed a number of different conceptual designs for review in a formal “Alternatives  
2 Analysis” process. AR0082126. In January 2010, LTD began a technical review designed  
3 to compare 10 Bus Rapid Transit alternatives, a no-action alternative, and a Transportation  
4 System Management (“TSM”) alternative that would enhance existing bus service with  
5 lower-cost improvements. AR0082126; AR0052649 – AR0052650.

6 LTD published the results of its initial technical review in a draft Alternatives  
7 Analysis Report that was released in October 2010. AR0082130. That report identified a  
8 route along West 11th and West 13th Avenues as substantially superior to the other  
9 alternatives, concluding that “[f]rom a technical perspective, the West 13th Avenue –West  
10 11th Avenue Alternative *performs best* and is the *recommended alternative*.” AR0053037  
11 (emphasis added). As a result, this route was recommended for selection as the Locally  
12 Preferred Alternative (“LPA”) in January 2011—a designation intended to signal LTD’s  
13 preference for that route above the other options studied in the Alternatives Analysis  
14 Report. AR0118730.

### 15 C. Environmental Review Process

16 When LTD and FTA prepared an Environmental Assessment (“EA”) in 2012 to  
17 fulfill their obligations under NEPA, they failed to mention that the West 13th-West 11th  
18 Avenue Alternative was the “recommended alternative” in the Alternatives Analysis  
19 Report. Instead, the EA casually states that in May 2011, certain “decision-making bodies”  
20 had “eliminated” this recommended alternative and instead identified a route along West  
21 6th Avenue and West 7th Avenue as the LPA. AR0082130 – AR0082131. Moreover, the  
22 West 6th-West 7th Avenues LPA was the *only* action alternative that FTA and LTD  
23 included in the EA. They completely excluded the technically superior West 13th-West  
24 11th Avenues route and the TSM alternative from the NEPA process. *Id.*

25 At the same time the “decision-making bodies” were excluding the technically  
26 preferred West 13th-West 11th Avenues route from the NEPA review, LTD was also



1 approaching FTA about significant changes to that review. In April 2011, LTD informed  
 2 FTA that it had selected the West 6th-West 7th Avenue alternative as the LPA, and had  
 3 made certain design modifications in an effort to avoid or minimize the project's  
 4 environmental effects. AR0052705; AR0053527 – AR0053592. Based on LTD's  
 5 presentation, FTA agreed that it could initiate the NEPA process by preparing an EA, rather  
 6 than the more detailed (and time-consuming) EIS that had been announced in FTA's 2007  
 7 Federal Register notice. *Id.*; AR0053497 – AR0053498.

8 FTA and LTD's EA for the WEEE was noticed for public comment in July 2012.  
 9 Although the EA acknowledged the potential for significant environmental effects on  
 10 several different resources (AR0082094 – AR082101), it concluded that those effects  
 11 would be mitigated below the level of significance (AR0082094). The EA went on to  
 12 compare the merits of two alternatives—constructing the WEEE along West 6th Avenue  
 13 and West 7th Avenue, and a no action alternative that would not make significant changes  
 14 to the existing transit system. AR0082131. Using the same measures of effectiveness  
 15 employed by the Alternatives Analysis Report (AR0082365 – AR0082366), the EA  
 16 concluded that the West 6th-West 7th Avenues route was superior to no action.  
 17 AR0082387. The vast majority of the nearly 300 submissions made during the public  
 18 comment period for the EA opposed the WEEE. AR0115160 – AR0115161; AR0078875 –  
 19 AR0080465.

20 In December 2012, FTA Region X issued a Finding of No Significant Impact  
 21 ("FONSI") for the WEEE. FTA's FONSI contained an appendix specifying mitigation  
 22 measures for, among other things, adverse effects on traffic, landowners, noise and  
 23 vibration, water resources and wetlands. AR0115284 – AR0115301. FTA concluded that  
 24 "the proposed project, with the mitigation that is required [by the FONSI], will have no  
 25 significant adverse impact on the environment." AR0115163; AR0115152. The agency  
 26 accordingly determined that preparation of an EIS was not required. AR0115163. Notice

1 of this final agency action appeared in the Federal Register on January 18, 2013.  
 2 AR0114559.

### 3 ARGUMENT

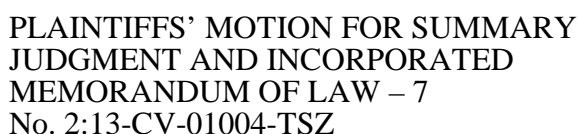
4 If a party believes that an agency has breached its responsibilities under NEPA, it  
 5 may seek judicial review pursuant to the Administrative Procedure Act (“APA”), which  
 6 allows a court to set aside an agency decision under NEPA that was “arbitrary, capricious,  
 7 an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2).

8 Although the APA’s standard of review is deferential, it still requires a careful examination  
 9 of the administrative record to determine whether the agency took a “hard look” at the  
 10 environmental consequences of its proposed action. *Marsh v. Oregon Natural Resources*  
 11 *Council*, 490 U.S. 360, 378 (1989) (citation omitted). If the agency’s decision was not  
 12 “founded on a reasoned evaluation of the relevant factors,” that decision will be vacated.  
 13 *See id.*

#### 14 A. FTA violated NEPA by failing to examine the West 13th-West 11th Avenues 15 route as part of the EA’s alternatives analysis.

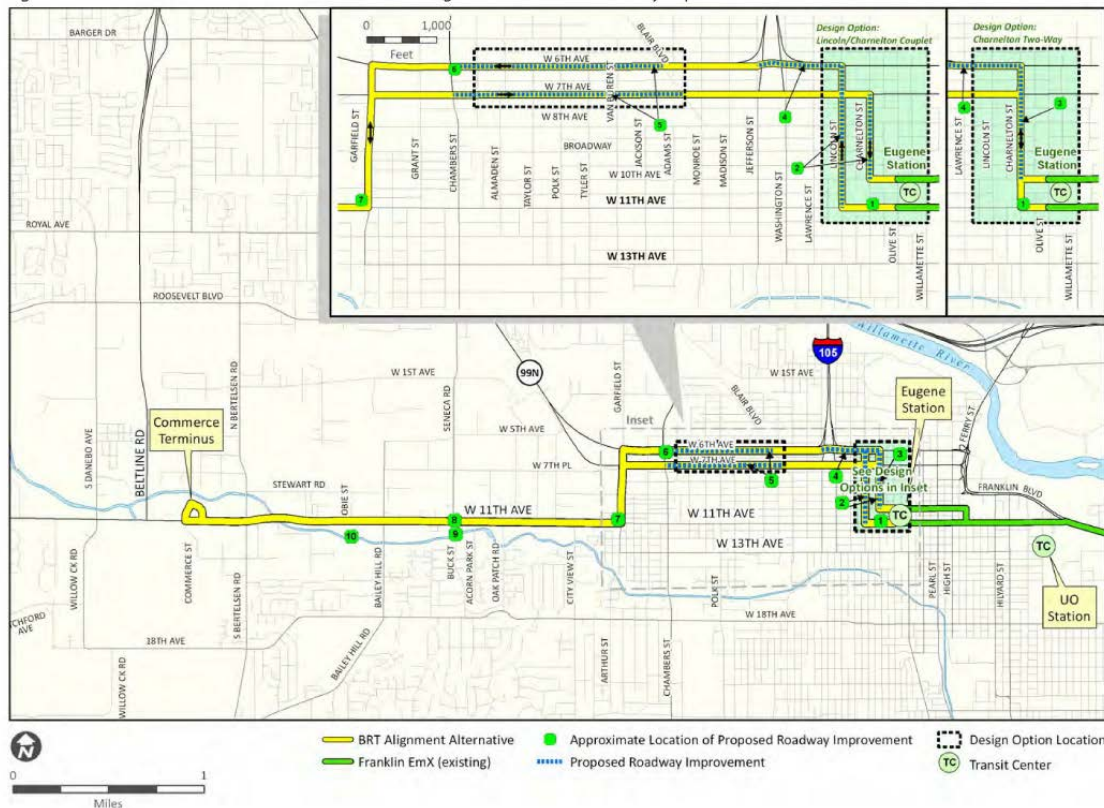
16 Consideration and comparison of alternatives is the heart of the analysis required by  
 17 NEPA. 40 C.F.R. § 1502.14. Because of its central importance to the statutory scheme,  
 18 “NEPA’s requirement that agencies ‘study, develop, and describe appropriate alternatives  
 19 . . . applies whether an agency is preparing an EIS or an EA.’” *Western Watersheds*  
 20 *Project*, 719 F.3d at 1050 (brackets omitted) (quoting *N. Idaho Cmty. Action Network v.*  
 21 *U.S. Dep’t of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008)). Preparing an EA allows an  
 22 agency to write a less detailed description of alternatives, but the agency “must still give  
 23 full and meaningful consideration to all reasonable alternatives.” *Id.* (citation and internal  
 24 quotation marks omitted). For that reason, “[t]he existence of a **viable but unexamined**  
 25 **alternative** renders an EA **inadequate**.” *Id.* (emphasis added) (brackets and citation  
 26 omitted).

Figure 2.10B. West 13th Avenue - West 11th Avenue Alignment Alternative Roadway Improvements



## West 6th-West7th Avenues Alternative

Figure 2.11B. West 6th/7th Avenues - West 11th Avenue Alignment Alternative Roadway Improvements



Because it was shorter, straighter, more cost-effective, and had a lower potential for significant environmental effects, the West 13th-West 11th Avenues route dramatically outperformed the West 6th-West 7th Avenues route in the Alternatives Analysis Report. AR0053036; AR0053039. The Alternatives Analysis Report concluded—using the same criteria employed in the EA—that the West 13th-West 11th Avenues route was superior to the LPA along West 6th-West 7th Avenues. AR0082365 – AR0082366. Thus, the West 13th-West 11th Avenues route is inarguably a *reasonable alternative* under NEPA. FTA’s failure to give “full and meaningful consideration” to that reasonable alternative in the EA was a blatant violation of NEPA. *See Western Watersheds*, 719 F.3d at 1050.



Perhaps sensing the weakness of its decision to exclude the West 13th-West 11th Avenues route from consideration in the EA, LTD commissioned an independent expert named Jarrett Walker to “review” the WEEE just a few months before the EA was released to the public. AR0115273. Walker’s April 2012 report underscores the unreasonableness of LTD’s alternatives discussion. According to Walker, the West 6th-West 7th Avenues route that had been selected as the only action alternative for consideration in the EA was “dramatically inferior” to the West 13th-West 11th Avenues route. AR0079544 – AR0079545. Walker’s report pointed out that “[s]uccessful rapid transit lines always follow a reasonably direct path between any two points on the line,” and that the detour to West 6th and West 7th Avenues was not a reasonably direct connection between downtown and the outer West 11th portion of the line. AR0079546; AR0079547. Moreover, the circuitous nature of the West 6th-West 7th Avenues route resulted in travel times between 31% and 37% higher than the West 13th-West 11th Avenues route. AR0079547. The report concluded that the West 6th-West 7th Avenues route “will always look and feel compromised,” and that “[e]ventually, it will be necessary to add this [West 13th-West 11th Avenues] segment back” into the EmX system. AR0079548.

Even though the EA states that all background reports and studies would appear on the LTD website (AR0118817), Walker’s report was not listed in the EA’s index of supporting documents or made available on the LTD website when the EA was released to the public.<sup>2</sup> AR0119175 – AR0119176. LTD did not acknowledge the existence of the Walker report until it came to light during the public comment period.<sup>3</sup> In the FONSI’s responses to public comments, LTD and FTA claimed that they had somehow read the

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<sup>2</sup> The failure to include relevant information like the Walker report in an EA is in itself a violation of NEPA. See *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213-14 (9th Cir. 1998).

<sup>3</sup> Walker’s report was also not provided to the relevant decision-making bodies before the publication of the EA. AR0115274 (noting that the City Council and LTD Board were provided with the report “later in the year,” before they voted to proceed with the LPA).

1 Walker report's devastating critique of the only route studied in the EA as concluding that  
 2 constructing the West 6th-West 7th Avenues route was "a reasonable step in building the  
 3 overall BRT system." AR0115274.

4 LTD's own evidence, both in the Alternatives Analysis Report and the Walker  
 5 report, showed that the West 13th-West 11th Avenues route was superior in virtually every  
 6 respect to the West 6th-West 7th Avenues route that was selected as the LPA in May 2011.  
 7 LTD has not and could not argue that the West 13th-West 11th Avenues route would not  
 8 satisfy the stated purpose and need for the WEEE. Nevertheless, this technically and  
 9 environmentally superior route was ***not considered at all*** as an alternative in the EA, nor  
 10 was any explanation for its omission given. Under clear Ninth Circuit precedent, the  
 11 existence of this "viable but unexamined alternative" renders FTA's EA "inadequate." *See*  
 12 *Western Watersheds*, 719 F.3d at 1050. For this reason alone, FTA's environmental review  
 13 under NEPA should be declared unlawful and set aside.

14 **B. The EA's statement of purpose and need violates NEPA.**

15 **1. The narrowness of the purpose and need statement caused the exclusion**  
 16 **of the otherwise reasonable Transportation System Management**  
 17 **alternative.**

18 As already noted, NEPA requires agencies to complete a review of all reasonable  
 19 alternatives. Whether an alternative is reasonable often hinges on the agency's definition of  
 20 the purpose and need for the proposed federal action. An alternative that fails to satisfy the  
 21 purpose and need of the proposed action can generally be excluded from further  
 22 consideration in a NEPA document. *National Parks & Conservation Assn. v. Bureau of*  
 23 *Land Mgmt.*, 606 F.3d 1058, 1071 (9th Cir. 2009). At the same time, "[a]n agency may not  
 24 define the objectives of its action in terms so unreasonably narrow that only one alternative  
 25 from the environmentally benign ones in the agency's power would accomplish the goals of  
 26 the agency's action . . . ." *Id.* at 1070 (citation omitted). That is because "[o]ne obvious  
 way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as

1 to define competing ‘reasonable alternatives’ out of consideration (and even out of  
2 existence).” *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997).

3 In this case, LTD claims to be facing a general need to address traffic congestion  
4 issues along the West 11th Avenue/Highway 126 route from Garfield Street west to the  
5 City of Veneta. AR0082090 – AR0082091. But the EA’s statement of purpose and need  
6 targets a problem far narrower than congestion in that corridor. In particular, the EA limits  
7 the purpose of the WEEE project to implementation of the “high-capacity transit mode  
8 identified in the Regional Transportation Plan.” AR0118850 (emphasis added). This  
9 statement effectively narrowed the project to Bus Rapid Transit in May 2008, more than  
10 four years before the EA was completed. AR0006333.

11 Bus Rapid Transit is not, of course, the only way to improve traffic flow and reduce  
12 congestion. Ostensibly recognizing this fact, LTD’s early consideration of potential  
13 solutions to the West 11th Avenue/Highway 126 congestion problem included the low-cost  
14 option of enhancing existing bus service, *i.e.*, Transportation System Management.  
15 AR0052649. TSM focuses on relatively low-cost capital improvements and transit service  
16 refinements, rather than major transit capital investments. TSM would consist of roadway  
17 capital improvements (*e.g.*, upgrading or constructing new roadways and/or intersections)  
18 and alterations to bus operations such as schedule and route adjustments. *Id.*; AR0082126.  
19 But LTD eliminated the otherwise perfectly viable TSM alternative as inconsistent with the  
20 project’s narrowly defined purpose. AR0082130.

21 The criteria used to evaluate alternatives in the Alternatives Analysis Report—  
22 which were derived from LTD’s narrow statement of purpose and need—indicate that  
23 implementing TSM was inferior to most Bus Rapid Transit options. AR0053036 –  
24 AR0053037. But finding that an alternative may be less desirable from a transportation  
25 perspective does not justify its exclusion from NEPA documents as an unreasonable  
26 alternative. Indeed, the Alternatives Analysis found that TSM would likely have been

1 environmentally superior to the West 6th-West 7th Avenues route studied in the EA.  
 2 AR0053034. Furthermore, the April 2012 Walker report reiterates the reasonableness of  
 3 the by-then excluded TSM alternative from a transportation perspective, pointing out that  
 4 the West 6th-West 7th Avenues route actually generates *slower* travel times than the  
 5 implementation of TSM.<sup>4</sup> AR0079547. By short-circuiting their NEPA review of the TSM  
 6 option, LTD and FTA impermissibly failed to consider those issues and excluded a  
 7 reasonable alternative that might have been superior to their preferred route.

8 NEPA “emphasizes the importance of coherent and comprehensive up-front  
 9 environmental analysis to ensure informed decision making,” thereby preventing agencies  
 10 from acting “on incomplete information, only to regret its decision after it is too late to  
 11 correct.” *Churchill County v. Norton*, 276 F.3d 1060, 1072-73 (9th Cir. 2001). Here, LTD  
 12 and FTA used the narrow purpose and need created in 2008 to prevent consideration in the  
 13 EA of an otherwise completely reasonable—and potentially environmentally superior—  
 14 alternative.<sup>5</sup> As a result, neither FTA nor the public was able to adequately compare the  
 15 environmental effects of TSM with the effects of the West 6th-West 7th Avenues route.  
 16 That arbitrary and capricious outcome mandates that FTA’s decision be declared unlawful  
 17 and set aside.

## 18 2. The WEEE simply is not needed.

19 The narrow goal that LTD is pursuing is not the only problem with its statement of  
 20 purpose and need. Although the EA lists several “needs” that LTD claims support the  
 21 construction of the WEEE (AR0082112 – AR0082113), the facts on the ground belie the

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22  
 23 <sup>4</sup> LTD inexplicably routed TSM buses along West 13th Avenue (AR0118028), when using existing routes  
 24 along West 11th Avenue would have further reduced travel times, making the TSM option even more  
 25 attractive.

26 <sup>5</sup> LTD was heavily invested in the construction of the WEEE and its “locally preferred” alternative. In 2010,  
 LTD paid thousands of dollars for a media relations firm to run a “political campaign” intended to “persuade  
 the public to support LTD’s efforts” on the WEEE, and to “monitor” the “social media interactions” of WEEE  
 opponents. AR0079516-AR0079521. Similar expenditures on public relations advocacy have continued  
 throughout the WEEE environmental review process, including \$39,000 in the third quarter of 2012 alone.  
 AR0079523.



1 notion that more bus service is needed along the corridor here at issue. When FTA and  
 2 LTD prepared their EA, LTD was operating a bus route identified as “Line 30” that was a  
 3 key part of proposed bus service presented in the EA’s no action alternative. AR0082132,  
 4 AR0082133, AR0082138. Today, however, that line has been taken out of service, strongly  
 5 suggesting a lack of ridership in precisely the area where the WEEE would operate. *See*  
 6 *LTD Cuts 20 Percent of Bus Service*, at <http://www.kval.com/news/91854329.html> (April  
 7 22, 2010). Indeed, press reports indicate that LTD took the 30 route out of service in  
 8 September 2010, before it had even published the Alternatives Analysis—a fact that goes  
 9 unmentioned in both the Alternatives Analysis Report and the EA.

10 NEPA requires “in-depth” consideration of the “threshold question” of “whether the  
 11 proposed policy is even necessary.” *Natural Resources Def. Council v. Hughes*, 437 F.  
 12 Supp. 981, 991 (D.D.C. 1977). Without evidence that a project is needed—or in the face of  
 13 evidence that it is not needed—an agency cannot satisfy NEPA’s requirement that it make  
 14 an informed decision. *Chelsea Neighborhood Ass’n v. U.S. Postal Serv.*, 516 F.2d 378, 389  
 15 (2d Cir. 1975). LTD’s claimed need for the WEEE rings hollow when viewed in light of its  
 16 decision to reduce bus service in the same area. Without concrete evidence of a need for  
 17 the WEEE, FTA is acting arbitrarily and capriciously by endorsing any alternative other  
 18 than no action.

19 **C. The EA’s discussion of environmental effects and mitigation is inadequate to**  
 20 **support FTA’s FONSI.**

21 In addition to excluding reasonable alternatives from detailed consideration in the  
 22 EA, FTA and LTD decided to shift from their original plan to prepare an EIS in favor of a  
 23 less-detailed EA. AR0052705. An EA must “provide[] sufficient evidence and analysis for  
 24 determining whether to prepare an Environmental Impact Statement or a finding of no  
 25 significant impact.” 40 C.F.R. § 1508.9(a)(1). Determining whether a project’s  
 26 environmental effects qualify as “significant” requires consideration of the intensity (i.e.,

the severity), as well as the context, of those effects. *See* 40 C.F.R. § 1508.27. To justify the issuance of a FONSI, an agency must evaluate all relevant factors and “supply a ‘convincing statement’ of reasons to explain why a project’s impacts are insignificant.” *Blue Mountains*, 161 F.3d at 1212. If the project will result in a significant effect, the agency must prepare an EIS unless it finds that changes or safeguards are incorporated into the action that sufficiently reduce the environmental effects to a minimum. 23 C.F.R. § 771.105(d); *see also* 76 Fed. Reg. 3843 (Jan. 21, 2011), Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact. Moreover, to prevail on a claim that an agency violated its statutory duty to prepare an EIS, a “plaintiff need not show that significant effects will in fact occur.” *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (internal quotations omitted), *overruled on other grounds by The Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008). It is enough that the plaintiff has raised “substantial questions [as to] whether a project may have a significant effect” on the environment. *Id.*

**1. The EA and FONSI fail to incorporate specific or defined mitigation measures that can adequately support a FONSI.**

By FTA’s admission, the WEEE will have significant adverse effects on the environment absent the implementation of mitigation measures. AR0118832. The only way to avoid preparation of an EIS in the face of such significant environmental effects is to demonstrate that they can be mitigated to the point of non-significance. The mitigation measures relied on in the EA, however, are not sufficiently specific or defined to support a FONSI. Founding a FONSI on mitigation requires sufficient explanation of why the agency concluded that mitigation can transform significant effects into insignificant ones. FTA’s proposed mitigation fails to do so.

Although FTA is not required to develop a complete mitigation plan, proposed mitigation measures “must be developed to a reasonable degree.” *National Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001) (citation omitted), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010). “A perfunctory description or mere listing of mitigation measures, without supporting analytical data, is insufficient to support a finding of no significant impact.” *Id.*; *see also Neighbors of Cuddy Mtn. v. U.S. Forest Service*, 137 F.3d 1972, 1380 (9th Cir. 1998) (rejecting “broad generalizations” and “vague references” to mitigation measures); *Idaho Sporting Congress*, 137 F.3d at 1151 (requiring analytical data to support proposed mitigation measures). An EA must demonstrate both that the proposed mitigation provides an “adequate buffer” against the negative impacts of the plan, and that the mitigation is concrete and enforceable. *National Parks & Conservation*, 241 F.3d at 735.

The EA in this case concludes that “[o]verall, taking into account mitigation, LTD does not expect that building and operating the Locally Preferred Alternative would cause significant adverse effect” (AR0118832), but fails to specify the mitigation to be relied on, or to make any firm commitments to mitigation measures. Its few references to mitigation describe measures that are required only “where feasible” or “where practicable.”<sup>6</sup> This is inadequate to ensure mitigation of the Project’s significant impacts and is, therefore, insufficient to support a FONSI.

The unenforceable claims of mitigation in the EA include:

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<sup>6</sup> The FONSI largely retains this type of qualifying language, and often leaves implementation of its “required” mitigation up to LTD. AR0115285 (describing a process LTD should use “to determine whether measures can successfully mitigate successful impacts”); AR0115286 (“determine feasible repairs”); AR0115287 (“where feasible”); AR0115288 (retain, protect existing trees and landscaping “where practicable”); AR0115289 (incorporate art elements “where feasible”); AR0115293 (replace trees “as feasible”); AR0115295 (minimize new impervious surface “as much as feasible”); AR0115298 (preserve existing trees “where practicable”); AR0115299 (minimize access impacts by “maximizing as feasible”; offset on-street parking loss “as feasible”; redesign and/or restripe off-street parking areas “where feasible”).



- 1           1. Parking Impacts: The EA concludes that “Mitigation measures such as restriping  
2           could reduce the net loss of off-street parking to as few as 18 parking spaces  
3           affecting five businesses/institutional sites, which would lose between one and  
4           seven spaces each. LTD would also replace off-street parking *if necessary* and  
5           *where feasible*.” AR0118834 (emphasis added).
- 6           2. Noise and Vibration Impacts: The EA acknowledges the likelihood of impacts—  
7           both construction impacts and impacts associated with the extension—but relies  
8           on mitigation to conclude that the impacts will not be significant. AR0118945-  
9           AR0118946. The mitigation measures outlined in the EA, however, particularly  
10          those associated with construction noise and vibration, fail to show how they  
11          would effectively mitigate that noise.
- 12          3. Geology and Seismic Activity Impacts: The EA acknowledges that soils  
13          exposed to excavation will be susceptible to erosion but the only mitigation  
14          suggested is the future preparation of geotechnical studies. AR0118979.  
15          Agencies cannot issue a FOSNI on the bases of studies that have not yet been  
16          performed. This is precisely why mitigation must be incorporated into the  
17          proposed action.
- 18          4. Wetlands Impacts: The EA recognizes that the West 6th-West 7th Avenues route  
19          will result in permanent impacts to wetlands. AR0118996. Although the EA  
20          states generally that it would mitigate these impacts by providing compensatory  
21          mitigation, the EA fails to provide any specifics or make any clear  
22          commitments.

23          Without a greater commitment to more detailed mitigation in these and other areas, FTA  
24          cannot reasonably conclude that the WEEE will not have significant effects on the  
25          environment. Accordingly, its FONSI should be declared unlawful and set aside.

1                   **2. The EA omits information concerning significant environmental effects.**

2                   In addition to the EA's failure to commit to sufficient mitigation, it does not give  
3                   adequate attention to other effects with the potential to be significant.

4                   **a. The EA fails to adequately address the WEEE's effects on**  
5                   **transit.**

6                   As proposed, the WEEE will require construction of approximately 5.9 miles of Bus  
7                   Rapid Transit lanes and 13 new stations or station pairs. AR0118825. Several sections of  
8                   the WEEE will consist of dedicated Bus Rapid Transit lanes, meaning that certain lanes  
9                   currently used for parking or vehicular traffic will be removed from the general use and  
10                  restricted to bus use only. AR0118879, AR0118822. To make matters worse, the West  
11                  6th-West7th Avenues route includes a designated freight route on the National Highway  
12                  System. AR0119073. Still, the EA fails to provide an adequate analysis of how the  
13                  removal of general purpose lanes on West 6th and West 7th Avenues will impact traffic  
14                  generally, and heavy vehicle traffic in particular.

15                 The decision to eliminate general purpose lanes on a National Highway System  
16                 Statewide Highway is a major policy decision that requires a formal technical review by the  
17                 Oregon Department of Transportation ("ODOT") and Federal Highway Administration. It  
18                 is not clear when, if ever, LTD will seek these approvals. Nevertheless, and without  
19                 conducting an adequate traffic study, the EA generally assumes that intersection  
20                 improvements associated with the project will also improve truck freight flow.  
21                 AR0119074. As explained by Plaintiffs' experts, this conclusion lacks a reasonable  
22                 foundation. A proper understanding of traffic and freight traffic effects would have  
23                 required an analysis that included, at a minimum:

- 24                 • an evaluation on how the removal of a through lane would affect weaving  
25                 among the remaining three lanes;

- an analysis on how the Bus Rapid Transit lane would function when tractor trailers, rather than small autos, need to use the turn lane;
- a comparative analysis of the “Locally Preferred Alternative” with the No-Build alternative queuing conditions;
- an analysis of the cumulative effect of the Project and other reasonably foreseeable Bus Rapid Transit projects on the long-term freight system in the Project area; and
- an evaluation of how disruptions in freight traffic could impair the operational efficiencies and ultimate viability of the industrial uses in the Project area.

AR0079509. Absent a more serious effort to evaluate traffic flow—the improvement of which is a primary purported goal of the WEEE—FTA and LTD cannot claim to have taken a “hard look” at the environmental effects of their project.<sup>7</sup>

In addition, the EA fails to analyze the adverse impacts that will result from adding two-way bus traffic adjacent to one-way automobile flow on Charnelton Street. Charnelton Street currently is classified as a “local street.” AR0119044. Local streets have the “sole function of providing direct access to adjacent land [and] are deliberately designed to discourage through-traffic movements.” AR0119041. The WEEE would eliminate local on-street parking in the inner commercial core area along Charnelton and would convert a travel lane currently serving as access to local businesses to a BRT specific lane.

AR0119068; AR0119073. The WEEE will therefore require a functional change in classification of Charnelton to account for the street being primarily used for regional transportation purpose, which will require a change to the Eugene-Springfield Metropolitan

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<sup>7</sup> It is apparent from the EA that LTD does not believe four mixed traffic lanes are needed on these avenues, as the WEEE will eliminate mixed traffic lanes along the EmX route. Yet, LTD has neither performed a study showing that four mixed traffic lanes are no longer needed on these streets nor provided any analysis of the impact of dedicated bus lanes on these streets, including the addition of six bus stops per hour in mixed traffic at two different spots.



1 Area General Plan (“Metro Plan”).<sup>8</sup> The EA has failed to address the impacts of this  
 2 change, or of the addition of 12 EmX buses to the current bus load schedule on Charnelton.

3 **b. The EA fails to assess foreseeable impacts of expected nodal**  
 4 **development.**

5 The EA claims that the WEEE would “advance the City’s land use plans for  
 6 increased density and development” in areas designated for “nodal development”<sup>9</sup>  
 7 (AR0118837), but it fails to adequately account for the indirect and cumulative impacts of  
 8 that increased density and development. If the WEEE is truly going to contribute to  
 9 development along the proposed route, then the EA should have considered that  
 10 development to be an indirect effect of the project, and conducted an evaluation of its  
 11 environmental impacts—including impacts to the areas along the route that are designated  
 12 “light to medium industrial” and “heavy industrial.”

13 Typically, high volume transit investments designed to serve nodal development are  
 14 situated to run through planned nodal development areas with the goal of maximizing the  
 15 transit investment potential. AR0079507. The WEEE, however, is not. Almost the entire  
 16 westbound WEEE route runs along areas designated for light-medium industrial and heavy  
 17 industrial in the Metro Plan. *Id.* This means a significant portion of the line will be located  
 18 next to areas where development intensity is modest and a change to more transit-  
 19 supportive land uses are *not* supported by the local comprehensive plan.

20 This is not the first proposed commercial encroachment in the industrial area around  
 21 West 6th and 7th Avenues. Consequently, the land use plans for these areas stress the  
 22 importance of retaining them as viable industrial areas. *Id.* The Metro Plan aims to ensure

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24 <sup>8</sup> The Metro Plan is the official long-range comprehensive plan of metropolitan Lane County and the cities of  
 25 Eugene and Springfield. It is available at [www.lcog.org/documents/metro/METROPLAN\\_currentto12-31-10.pdf](http://www.lcog.org/documents/metro/METROPLAN_currentto12-31-10.pdf).

26 <sup>9</sup> Nodal development is generally found in suburban and urban locations that provide a mix of residential  
 commercial, and service opportunities in a compact, walkable area.



1 compatibility between industrial lands and adjacent areas by providing existing industrial  
 2 activities sufficient adjacent land for future expansion, discouraging amendments to the  
 3 Plan that would change development-ready industrial lands to non-industrial designations,  
 4 and encouraging compatibility between industrial zoned lands and adjacent areas in local  
 5 planning programs. Moreover, the Bethel-Danebo Neighborhood Refinement Plan Phase II  
 6 provides that remaining industrial areas should be protected from encroachment by  
 7 incompatible uses.<sup>10</sup>

8 The EA contains no meaningful analysis of the WEEE's conflict with these land use  
 9 plans, and does not adequately discuss how the project would negatively impact the  
 10 industrial land uses—and industrial jobs—adjacent to the project. Again, this represents a  
 11 failure to take a “hard look” at the effects of the WEEE in the EA.

12 **c. The EA fails to provide an analysis of proportional effects on**  
 13 **minority populations.**

14 Presidential Executive Order 12898 requires federal agencies to identify and address  
 15 disproportionately high and adverse human health or environmental effects of their  
 16 programs and activities. The U.S. Department of Transportation Order implementing  
 17 Executive Order 12898 requires the Department to avoid disproportionately high and  
 18 adverse effects on minority populations. 62 Fed. Reg. 18377 (April 15, 1997).

19 When LTD prepared its Alternatives Analysis, it included a map showing that the  
 20 minority population in the area affected by the WEEE is significantly higher than the  
 21 minority population in the rest of the region. AR0118194. The same map appeared in the  
 22 EA (AR0082192), which explicitly acknowledged that the project area “has a greater  
 23 proportion of low-income people and minorities” (AR0082197). But that is as far as the  
 24 analysis goes. The EA effectively assumes, apparently without consideration of changes to  
 25

26 <sup>10</sup> Available at: [https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/7901/Eugene\\_Bethel\\_Danebo\\_Refinement\\_Plan\\_2.pdf?sequence=1](https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/7901/Eugene_Bethel_Danebo_Refinement_Plan_2.pdf?sequence=1).



1 bus service or the potential for displacement of minority residents or businesses, that the  
 2 effects of the WEEE on minorities will not be disproportionately high or adverse.<sup>11</sup>  
 3 AR0082197 – AR0082198. The EA fails to include any meaningful analysis of  
 4 environmental justice, or any supporting documentation to substantiate the conclusion that  
 5 adverse impacts on minority populations will not be disproportionately high. Rather, the  
 6 EA simply provides descriptive statistics, pulled primarily from census data, on the  
 7 minority population in the project area. A meaningful analysis of impacts to minority  
 8 populations requires comparisons of proportionate impact between minority populations  
 9 and the population of a whole. The EA’s failure to take a “hard look” at environmental  
 10 justice effects accordingly warrants a declaration that FTA’s environmental review under  
 11 NEPA was unlawful and should be set aside.

### 12 CONCLUSION

13 For the reasons stated above, Plaintiffs respectfully request that the Court grant  
 14 summary judgment in their favor; declare unlawful and set aside FTA’s environmental  
 15 review of the WEEE under NEPA; enjoin the grant of any Small Starts funding for the  
 16 WEEE until FTA complies with NEPA; enjoin LTD from moving forward with the WEEE  
 17 (including through the acquisition of property); award Plaintiffs their attorneys’ fees; and  
 18 grant such other relief as the Court may deem necessary or appropriate.

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 26 <sup>11</sup> Plaintiffs are aware that one of the two businesses that LTD admits will close due to the proposed project is minority-owned. The EA does not mention this fact.

1 DATED: January 31, 2014.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 31, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated January 31, 2014 at Seattle, Washington.

s/Sue Stephens  
Sue Stephens, Legal Assistant

